

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Carriage of the Transmissions)
of Digital Television Broadcast Stations)

Amendments to Part 76)
of the Commission's Rules)

CS Docket No. 98-120

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

REPLY COMMENTS

Morgan Murphy Stations¹ ("Morgan Murphy"), by its attorneys, hereby files Reply Comments in response to the *Notice of Proposed Rulemaking* ("NPRM") in the above-referenced proceeding.

I. Requiring Cable Operators to Carry DTV Signals During the DTV Transition Would Not Constitute a Taking of Property Under the Fifth Amendment

The National Cable Television Association ("NCTA") argues in its Comments that because digital must carry constitutes an "intrusion on the right of [cable] operators to exclude others from the use of their property," it therefore constitutes an unlawful taking under the Fifth Amendment. NCTA Comments at 33.

While the Fifth Amendment bars the federal government from taking private property

¹ Morgan Murphy Stations, through its FCC-licensed subsidiaries operates KXLY-TV Spokane, Washington; KAPP-TV Yakima, Washington; KVEW-TV Kennewick, Washington; and WISC-TV Madison, Wisconsin.

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without just compensation, it is beyond dispute that it does not prevent the government from imposing even substantial regulatory burdens on the use of privately-owned property where such regulation is deemed necessary to promote the public interest. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

On the other hand, the Supreme Court has long considered a physical and permanent intrusion by the government to be "a property restriction of an unusually serious character for purposes of the Takings Clause." *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("*Loretto*") (wherein the Supreme Court struck down a New York statute that required landlords to permit a local franchised cable television company to install its equipment on their buildings). Only in such cases has the Supreme Court found an unlawful taking without regard to any public benefit that may have resulted. *See Id.* at 434.

" When the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

NCTA's attempt however to broaden the scope of the "per se" takings doctrine articulated in *Loretto* by characterizing digital must carry as a physical intrusion onto a cable operator's property is clearly contrary to legal precedent. As the Court stated in *Loretto*, "Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking." *Id.* at 441 (emphasis added). As the Court in *Loretto* further noted "[w]hether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Id.* at 437.

In fact, a review of the cases that have applied this per se takings rule, both prior and subsequent to *Loretto*, makes it clear that it is only where there is a permanent and physical government intrusion into private property will the Court find an unlawful taking without considering the public interest benefits. See, e.g., *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872) (government authorized construction of a dam which permanently flooded plaintiff's property constituted a taking); *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924) (to be a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property"); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (government's seizure of a coal mine to prevent a national strike of coal miners constituted a taking).

- Furthermore, not only does DTV must carry not qualify as a physical intrusion as contemplated in the per se takings doctrine, it is also not permanent. In this regard, the requirement that cable operators carry both the analog and digital signals will be temporary, lasting only until the end of the DTV transition which is scheduled to occur in 2006. Thus, NCTA's novel idea that must carry constitutes a physical intrusion onto a cable operator's property for purposes of the Fifth Amendment, and its application of the per se takings doctrine which has only been applied to permanent and physical intrusions onto private property is clearly at odds with legal precedent and the Supreme Court's narrow application of this doctrine.

Thus, contrary to NCTA's position, if challenged, digital must carry would be analyzed under the Supreme Court's traditional takings analysis not involving a physical and permanent intrusion onto private property. A review of such regulatory takings cases reflects the fact that

the government has very broad power to impose regulations that affect – and even substantially diminish – the value of private property. *See, e.g., Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879) (a city's construction of a temporary dam in a river to permit construction of a tunnel was not a taking even though the plaintiffs were thereby denied access to their premises because the obstruction only impaired the use of plaintiffs' property); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) ("When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.") (emphasis added).

A reasonable, capacity-based digital must carry requirement during the DTV transition as proposed by Morgan Murphy would impose a minor and temporary burden on cable operators and such a requirement would clearly be consistent with a host of regulatory actions by the government that seek to adjust the benefits and burdens of economic life to promote the common good. Accordingly, contrary to NCTA's position, digital must carry during the DTV transition would not constitute a taking as contemplated by the Fifth Amendment of the Constitution.

II. Requiring Cable Operators to Carry DTV Signals During the DTV Transition Would Not Violate the First Amendment.

NCTA also argues in its Comments that digital must carry during the DTV transition would violate the First Amendment of the Constitution. NCTA at 21. Like others arguing against digital must carry, NCTA presents the Commission with a false, all-or-nothing, choice to support its argument that digital must carry would violate cable operators' First Amendment rights. As Morgan Murphy outlined in its Comments, a reasonable, capacity-based DTV must carry

requirement, such as the one proposed by Morgan Murphy, would properly take into account the legitimate interests of cable operators and therefore would pass Constitutional muster.

In fact, contrary to NCTA's position, the Supreme Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 117 S. Ct. 1174 (1997) ("*Turner II*") bears out that a reasonable DTV transition signal carriage requirement will withstand constitutional scrutiny to the extent such a carriage requirement does not overly burden cable operators' constitutionally protected speech. A capacity-based DTV must carry requirement, such as outlined in Morgan Murphy's Comments, along with a small system exemption and one-third capacity limit, will not place an undue burden on cable operators. In this regard, the cable industry over the last five years has been undergoing unprecedented growth and is rapidly implementing its own digital transition and system upgrades.² For the most part, as reflected in the Strategic Policy Research study commissioned by the National Association of Broadcasters, cable systems do in fact have the capacity to carry DTV signals during the transition without having to drop existing cable channels. Further, the introduction of digital encoding and compression will substantially increase cable systems' useable channel capacity. Thus, digital must carry during the DTV transition, with the current one-third capacity limit and appropriate exemptions for small cable operators and non-upgraded systems, places a proportionally lesser burden on cable systems than the analog must carry requirement which the Supreme Court recently found to be Constitutional.

² See *Fourth Annual Report* at ¶¶21-31. Price Colman, *Cable 1998: Stand and Deliver*, Broadcast and Cable, December 8, 1997, p.42.

Accordingly, to further the goals of preserving free over-the-air broadcast television while ensuring a rapid transition to digital television and return of the analog spectrum, the Commission should adopt a reasonable, capacity-based digital must carry requirement, based on the framework proposed by Morgan Murphy in its Comments.

In this regard, cable systems of less than 450 MHz with vacant activated channels should be required to carry all local DTV signals, up to one-third of the system's capacity. Where such a system is channel-locked, the operator should not be required to drop an existing cable channel to accommodate a local DTV signal. Cable systems operating with a capacity of between 450-749 MHz, should be required to carry both the analog and DTV signals, up to the one-third capacity limit, throughout the DTV transition. While such systems should also not be required to disrupt existing services to carry a DTV signal, digital system operators should be required to make use of their currently utilized digital signal compression technology in order to maximize system capacity and accommodate the local DTV signals.³ Finally, full DTV must carry obligations should apply to cable systems of 750 MHz or greater, but up to the one-third capacity limit.

III. Conclusion

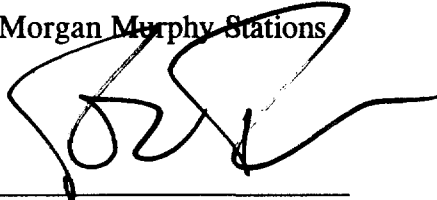
In order for broadcasters to continue to provide the American people with quality, free over-the-air television programming, the FCC must ensure that those 70% of U.S. households that subscribe to cable are able to receive digital signals during the DTV transition. Therefore, Morgan Murphy Stations respectfully requests that the Commission adopt reasonable digital must

³ Such compression however must not materially degrade the broadcaster's DTV channel.

carry rules such as those outlined above and more fully in its Comments in order to ensure a successful DTV transition to benefit the public.

Respectfully submitted,

Morgan Murphy Stations

A handwritten signature in black ink, appearing to be 'Rini', written over a horizontal line.

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